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10/034,369	12/28/2001	Deborah Chrisman	S0595.0078/P078	8707
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DICKSTEIN SHAPIRO LLP 1177 AVENUE OF THE AMERICAS (6TH AVENUE) NEW YORK, NY 10036-2714			EXAMINER BOSWELL, BETH V	
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1 UNITED STATES PATENT AND TRADEMARK OFFICE

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3  
4 BEFORE THE BOARD OF PATENT APPEALS  
5 AND INTERFERENCES  
6

7  
8 *Ex parte* Deborah Chrisman and Steve Hornsby  
9

10  
11 Appeal 2008-3405  
12 Application 10/034,369  
13 Technology Center 3600  
14

15  
16 Decided: December 2, 2008  
17

18  
19 Before LINDA E. HORNER, ANTON W. FETTING, and BIBHU R.  
20 MOHANTY, *Administrative Patent Judges*.  
21 FETTING, *Administrative Patent Judge*.

22 DECISION ON APPEAL

23 STATEMENT OF CASE

24 Deborah Chrisman and Steve Hornsby (Appellants) seek review under  
25 35 U.S.C. § 134 of a final rejection of claims 1-43, the only claims pending in the  
26 application on appeal.

27 We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b) (2002).

1       We AFFIRM.

2       The Appellants invented a system and method for electronically scheduling and  
3 tracking labor (Specification: page 1, lines 16-17).

4       An understanding of the invention can be derived from a reading of exemplary  
5 claims 1, 19, and 32, which are reproduced below [bracketed matter and some  
6 paragraphing added].

7       1. A method for managing a store activity, said method comprising:

8       [1]   electronically receiving store information,

9               said store information including information related to  
10              stores;

11      [2]   electronically receiving product information,

12              said product information including information related  
13              to products;

14      [3]   electronically receiving labor information,

15              said labor information including information related to  
16              labor;

17      [4]   electronically receiving labor requirements,

18              said labor requirements representing estimates of time  
19              required to perform said store activity;

20      [5]   receiving a request for labor to perform said store activity;

21      [6]   automatically determining an amount of said labor needed to  
22 perform said store activity using said store information, said product  
23 information, said labor information and said labor requirements; and

24      [7]   electronically notifying parties contributing said determined  
25 labor.

- 1           19. A method for using a user terminal coupled to a site processor  
2           across a communication network to manage a store activity, said  
3           method comprising:
- 4           [1]   electronically receiving store information,  
5                        said store information including at least one of individual  
6                        store characteristics, store locations, store departments  
7                        and store groups;
- 8           [2]   electronically receiving product information,  
9                        said product information including at least one of  
10                      individual product characteristics, product categories and  
11                      manufacturers;
- 12          [3]   electronically receiving labor information,  
13                        said labor information including at least one of labor  
14                        brokers, manufacturers and labor forces;
- 15          [4]   electronically receiving labor requirements,  
16                        said labor requirements representing estimates of time  
17                        required to perform said store activity for each of said  
18                        product categories;
- 19          [5]   determining a fair share of a total amount of labor needed to  
20          perform said store activity as a function of at least one of said store  
21          information, said product information, said labor information and said  
22          labor requirements;
- 23          [6]   electronically scheduling said store activity, said step of  
24          electronically scheduling including  
25                        electronically notifying parties contributing labor to said  
26                        store activity and  
27                        transmitting details of said store activity to said parties;  
28                        and
- 29          [7]   electronically receiving feedback from said parties contributing  
30          said labor to said store activity.
- 31

32. A system for communicating with a user terminal across a communication network to manage store activity, said system comprising:

[1] a site processor adapted to receive requests from said user terminal through said communication network;

[2] a first software module operating on said site processor,  
said first software module determining a fair share of a  
total amount of labor needed to perform said store  
activity as a function of at least one of store information,  
product information, labor information and labor  
requirements;

[3] a second software module operating on said site processor,  
said second software module scheduling said store  
activity, said second software module further notifying  
parties contributing labor to said store activity and  
transmitting details of said store activity to said parties;  
and

[4] a third software module operating on said site processor,  
said third software module electronically receiving  
feedback from said parties contributing labor to said store  
activity.

This appeal arises from the Examiner's Final Rejection, mailed March 10, 2006. The Appellants filed an Appeal Brief in support of the appeal on February 7, 2007. An Examiner's Answer to the Appeal Brief was mailed on June 6, 2007. A Reply Brief was filed on August 6, 2007.

## PRIOR ART

The Examiner relies upon the following prior art:

Certified Marketing Services (CMS), Web pages at  
<http://www.certifiedmarketingservices.com> (March 10, 2003 from  
archive.org)

Tenma et al.                      US 4,947,322                      August 7, 1990

Blank (Blank, Christine, “Shelf Service; A Greater Reliance by  
Supermarkets on Third-Party Merchandisers is Changing the Way  
Retailers Do Business with Them, as Well as Increasing Demands on the  
Firms”, Supermarket News, November 13, 2000)

Mumford et al. (Mumford, Karen, Smith, Peter N., “Men, Women, and the  
Hiring Function”, Economic Record, 2000)

Tenser (Tenser, James, “ASMC Chief Puts Issue of Mandating on Front  
Burner”, Supermarket News, December 15, 1997)

REJECTIONS

Claims 1-43 stand rejected under 35 U.S.C. § 103(a) as unpatentable over  
CMS, Tenma, and Official Notice

ISSUE

The issue pertinent to this appeal is whether the Appellants have sustained  
their burden of showing that the Examiner erred in rejecting claims 1-43 under  
35 U.S.C. § 103(a) as unpatentable over CMS in view of Tenma.

The pertinent issue turns on whether the art applied describes or suggests  
“determining an amount of labor...” as per claim 1 and “determining a fair  
share...” as per claims 19 and 32.

FACTS PERTINENT TO THE ISSUES

The following enumerated Findings of Fact (FF) are believed to be supported  
by a preponderance of the evidence.

*Facts Related to Appellants' Disclosure*

01. Store remodeling or reset may consume considerable amounts of time and the retail store is responsible for identifying the relative amount owed by manufacturers (Specification: page 3, lines 7-14, i.e. paragraph 0008).

02. A manufacturer's "fair share" percentage is the number of labor hours involved, with respect to each product category, to perform a remodel/reset (Specification: page 20, lines 20-27 and page 21, lines 1-5, i.e. paragraph 89).

*CMS*

03. CMS discloses a method for in-store/on-site retail merchandising and detailing, on-site/in-store new package conversion, and signage conversion and installation (CMS: page 2, section 1).

04. CMS discloses a user submitting store information, such as specific retail channels, and product information, such as product price in order to determine competitive product pricing to CMS through a website in order to determine available services, such as product placement, merchandizing, and detailing services (CMS: page 6, sections 1-4 and page 11, sections 1-3).

05. CMS performs visits that vary based on the levels of services required for the services purchased (CMS: page 7, section 2 and page 13 section 1).

06. CMS teaches a customer submitting relevant information as a request for information/quote for potential services to be performed (CMS: page 7, section 2, page 11 section 3, and page 12).

*Tenma*

07. Tenma teaches a system and method for the control of goods in a store in which the goods are arranged in a gondola and sold (Tenma: column 1, lines 5-6).

08. An object of Tenma is to provide a system for the control of goods that is efficient (Tenma: column 1, lines 46-51).

09. Tenma discloses the automatic determination of the layout of goods based on the quantity of goods and rules regarding layout (Tenma: column 2, lines 8-10).

10. Tenma makes the automatic determination, using a machine, of the layout using floor layout information, sales information, goods layout information, goods information, and rules information (Tenma: column 3, lines 32-33 and column 3, lines 39-50).

11. The goods information includes characteristics of each good (Tenma: column 3, lines 45-46).

*Blank*

12. Blank describes the changes in merchandizing at supermarkets between retailers and manufacturers (Blank: page 29, paragraphs 1-3).

13. Blank describes retailers and manufacturers paying for a portion of the labor costs of resets and remodels. The portion is part of a fair share program (Blank: page 29, 3<sup>rd</sup> paragraph and 4<sup>th</sup> paragraph).



1           14. Blank describes a minimum 50/50 split of labor between retailers and  
2           manufacturers (Blank: page 29, last paragraph).

3           *Mumford*

4           15. Mumford describes a study on ranking labor force groups and genders  
5           in terms of hiring probabilities (Mumford: page 375 third paragraph).

6           16. Mumford describes a “fair share” of hiring across applicant groups  
7           (Mumford: page 375 fourth paragraph).

8  
9           *Tenser*

10          17. Tenser describes the interactions between retailers, manufacturers,  
11          and brokers in the retail food sales industry with respect to reset and  
12          shelf maintenance work (Tenser: page 1, paragraphs 1-2).

13          18. Tenser discusses the fair and equitable distribution of costs and work  
14          associated with resets and shelf management (Tenser: page 2, paragraphs  
15          5 and 9).

16          *Facts Related To The Level Of Skill In The Art*

17          19. Neither the Examiner nor the Appellants has addressed the level of  
18          ordinary skill in the pertinent art of scheduling resources. We will  
19          therefore consider the cited prior art as representative of the level of  
20          ordinary skill in the art. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355  
21          (Fed. Cir. 2001) (“[T]he absence of specific findings on the level of skill  
22          in the art does not give rise to reversible error ‘where the prior art itself  
23          reflects an appropriate level and a need for testimony is not shown’”)

(quoting *Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163 (Fed. Cir. 1985)).

*Facts Related To Secondary Considerations*

20. There is no evidence on record of secondary considerations of non-obviousness for our consideration.

PRINCIPLES OF LAW

*Claim Construction*

During examination of a patent application, pending claims are given their broadest reasonable construction consistent with the specification. *In re Prater*, 415 F.2d 1393, 1404-05 (CCPA 1969); *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004).

Limitations appearing in the specification but not recited in the claim are not read into the claim. *E-Pass Techs., Inc. v. 3Com Corp.*, 343 F.3d 1364, 1369 (Fed. Cir. 2003) (claims must be interpreted “in view of the specification” without importing limitations from the specification into the claims unnecessarily).

Although a patent applicant is entitled to be his or her own lexicographer of patent claim terms, in *ex parte* prosecution it must be within limits. *In re Corr*, 347 F.2d 578, 580 (CCPA 1965). The applicant must do so by placing such definitions in the Specification with sufficient clarity to provide a person of ordinary skill in the art with clear and precise notice of the meaning that is to be construed. *See also In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994) (although an inventor is free to define the specific terms used to describe the invention, this must be done with reasonable clarity, deliberateness, and precision; where an inventor chooses to give terms uncommon meanings, the inventor must set out any

1 uncommon definition in some manner within the patent disclosure so as to give  
2 one of ordinary skill in the art notice of the change).

3 *Obviousness*

4 A claimed invention is unpatentable if the differences between it and the  
5 prior art are “such that the subject matter as a whole would have been obvious at  
6 the time the invention was made to a person having ordinary skill in the art.”  
7 35 U.S.C. § 103(a) (2000); *KSR Int’l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1729-30  
8 (2007); *Graham v. John Deere Co.*, 383 U.S. 1, 13-14 (1966).

9 In *Graham*, the Court held that that the obviousness analysis is bottomed on  
10 several basic factual inquiries: “[ (1) ] the scope and content of the prior art are to be  
11 determined; [ (2) ] differences between the prior art and the claims at issue are to be  
12 ascertained; and [ (3) ] the level of ordinary skill in the pertinent art resolved.”  
13 383 U.S. at 17. *See also KSR Int’l v. Teleflex Inc.*, 127 S.Ct. at 1734. “The  
14 combination of familiar elements according to known methods is likely to be  
15 obvious when it does no more than yield predictable results.” *KSR*, at 1739.

16 “When a work is available in one field of endeavor, design incentives and  
17 other market forces can prompt variations of it, either in the same field or a  
18 different one. If a person of ordinary skill can implement a predictable variation,  
19 § 103 likely bars its patentability.” *Id.* at 1740.

20 “For the same reason, if a technique has been used to improve one device,  
21 and a person of ordinary skill in the art would recognize that it would improve  
22 similar devices in the same way, using the technique is obvious unless its actual  
23 application is beyond his or her skill.” *Id.*

“Under the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.” *Id.* at 1742.

## Automation of a Known Process

It is generally obvious to automate a known manual procedure or mechanical device. Our reviewing court stated in *Leapfrog Enterprises Inc. v. Fisher-Price Inc.*, 485 F.3d 1157 (Fed. Cir. 2007) that one of ordinary skill in the art would have found it obvious to combine an old electromechanical device with electronic circuitry “to update it using modern electronic components in order to gain the commonly understood benefits of such adaptation, such as decreased size, increased reliability, simplified operation, and reduced cost. . . . The combination is thus the adaptation of an old idea or invention . . . using newer technology that is commonly available and understood in the art.” *Id.* at 1163.

## ANALYSIS

*Claims 1-43 rejected under 35 U.S.C. § 103(a) as unpatentable over CMS in view of Tenma*

Appellants argue the claims in three groups:

Group I                      Claims 1-18

Group II                      Claims 19-31

Group III                      Claims 32-43

*Group I*

The Appellants argue claims 1-18 as a group.

We select claim 1 as representative of the group. 37 C.F.R. § 41.37(c)(1)(vii) (2007).

1 The Examiner found that CMS taught all of the limitations of claim 1, except  
2 for limitation [2]. The Examiner found that Tenma described the missing  
3 limitation [2], electronically receiving product information. The Examiner also  
4 found that Tenma's system for the control of goods was efficient. The Examiner  
5 concluded that it would have been obvious to combine the teachings of Tenma to  
6 CMS in order to increase the efficiency of CMS's planning capabilities (Answer,  
7 pp. 3-6).

8 The Appellants contend that 1) CMS and Tenma fail to disclose electronically  
9 receiving labor requirements and *automatically* determining an amount of labor  
10 (Br. 10, third paragraph, Br. 12, last paragraph and Br. 13, first paragraph) and 2)  
11 CMS fails to disclose that the data is received *electronically* (Br. 12, first full  
12 paragraph).

13 We disagree with the Appellants. First, Appellants have not argued any other  
14 limitations in claim 1 and we find that CMS and Tenma describe these limitations  
15 (FF 04, FF 05, FF 06, FF 10, and FF 11).

16 With respect to Appellants' first argument, the Appellants have admitted that  
17 CMS describes manually receiving labor requirements (Reply Brief: page 1, last  
18 paragraph, "In the CMS reference, the process for determining labor requirements  
19 are discussed as a manual one-on-one activity...") and manually determining the  
20 amount of labor needed (Reply Brief: page 1, last paragraph, "...it is clear that  
21 account managers determine the amount of labor needed on a case-by-case  
22 basis..."). As such, the issue turns on whether it would have been obvious to make  
23 such a determination *automatically* as per limitation [6] of claim 1. We agree with  
24 the Examiner that it is generally obvious to automate a known manual process.  
25 *Leapfrog*, 485 F.3d at 1163. Appellants have admitted that the manual process is

1 described by CMS. The mere automation of this known manual process is the  
2 adaptation of an old idea or invention using newer technology that is commonly  
3 available and understood in the art and therefore obvious.

4 With respect to Appellants' second argument of electronic reception, CMS  
5 describes a website where a customer submits information through the website for  
6 analysis (FF 04 and FF 06). Thus, the entire transaction described is performed on  
7 an electronic medium and is performed electronically.

8 The Appellants have not sustained their burden of showing that the Examiner  
9 erred in rejecting claims 1-18 under 35 U.S.C. § 103(a) as unpatentable over CMS  
10 in view of Tenma for the above reasons.

11 *Group II*

12 The Appellants argue claims 19-31 as a group.

13 We select claim 19 as representative of the group. 37 C.F.R. § 41.37(c)(1)(vii)  
14 (2007).

15 The Examiner found that CMS taught all of the limitations of claim 1 except  
16 for limitation [2], product information, and limitation [5], determining a "fair  
17 share." The Examiner applied Tenma to cure this deficiency of limitation [2] (as  
18 discussed above) and has taken Official Notice of limitation [5] (Answer 15-18).

19 The Appellants contend that the Examiner has improperly taken Official Notice  
20 that determining a "fair share" is well known in labor industries (Br. 16 first  
21 paragraph). Appellants further contend that Blank and Mumford, the references  
22 submitted in support of the Official Notice, fail to describe fair share within the  
23 meaning of fair share in the present invention.

We disagree with the Appellants. First, Appellants' have not argued any other limitations in claim 19 and we find that CMS and Tenma describe these limitations (FF 04, FF 05, FF 06, FF 10, and FF 11).

The issue before us is whether the Examiner has established a prima facie case of obviousness. Thus, the pertinent question is whether the Examiner properly relied upon Official Notice as evidence showing that certain claimed subject matter was well known in the art to one of ordinary skill in the art at the time the application was filed. We find that the Examiner has rationally applied assertions that certain facts are well known or common knowledge in the art by providing a technical line of reasoning underlying the determination of obviousness that is clear and unmistakable. The Examiner has additionally shown that these facts are capable of instant and unquestionable demonstration as being well-known by submitting multiple references that describe these facts. Specifically, Blank and Tenser describe “fair share” in the meaning used in the present invention (FF 02, FF 13, FF 14, and FF 18). Appellants describe “fair share” as division of costs based on work needed/performed (FF 02). Blank and Tenser explicitly describe “fair share” in this manner with respect to scheduling resources (FF 13, FF 14, and FF 18). We find that the Examiner has established a prima facie case of obviousness as the Examiner has accurately and properly taken Official Notice of facts that are old and well known in the art, and supported that notice with sufficient evidence.

The Appellants have not sustained their burden of showing that the Examiner erred in rejecting claims 19-31 under 35 U.S.C. § 103(a) as unpatentable over CMS in view of Tenma for the reasons above.

*Group III*

1 The Appellants argue claims 32-43 as a group.

2 We select claim 32 as representative of the group. 37 C.F.R. § 41.37(c)(1)(vii)  
3 (2007).

4 The Examiner found that CMS taught all of the limitations of claim 1 except  
5 limitation [2], determining a “fair share.” The Examiner has taken Official Notice  
6 of limitation [2] and has not relied on Tenma in support of the rejections of the  
7 claims (Answer 18-19).

8 Appellants contend that neither CMS nor Tenma describe a software module  
9 that determines the fair share of labor (Br. 18 second paragraph).

10 We disagree with the Appellants. First, Appellants’ have not argued any other  
11 limitations in claim 32 and we find that CMS and Tenma describe these limitations  
12 (FF 04, FF 05, FF 06, FF 10, and FF 11).

13 CMS describes a website that used to collect and process data (FF 04 and FF  
14 06). A website is composed of software and as such describes software modules.

15 The Appellants additionally argue CMS and Tenma fail to teach a “fair share”  
16 (Br. 18 second paragraph). This argument was found to be insufficient to  
17 overcome their burden showing that the Examiner erred in rejecting claims *supra*.

18 Therefore the Appellants have not sustained their burden of showing that the  
19 Examiner erred in rejecting claims 32-43 under 35 U.S.C. § 103(a) as unpatentable  
20 over CMS in view of Tenma.

## 21 CONCLUSIONS OF LAW

22 The Appellants have not sustained their burden of showing that the Examiner  
23 erred in rejecting claims 1-43 under 35 U.S.C. § 103(a) as unpatentable over the  
24 prior art.



1 On this record, the Appellants are not entitled to a patent containing claims 1-  
2 43.

3 DECISION

4 To summarize, our decision is as follows:

- 5 • The rejection of claims 1-43 under 35 U.S.C. § 103(a) as unpatentable over  
6 CMS in view of Tenma is sustained.

7 No time period for taking any subsequent action in connection with this appeal  
8 may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

9  
10 AFFIRMED

11  
12  
13 JRG

14  
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